Supreme Court, U. S.
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No. 78-1284

In the Supreme Court of the United States

OCTOBER TERM, 1978

BUB DAVIS PACKING CO., INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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1. Petitioner brought this action in the United States District Court for the Western District of Texas under the Federal Tort Claims Act, 28 U.S.C. 1346, 2671 *et seq.* Petitioner sought damages for the allegedly wrongful closing of its meat packing plant by the United States Department of Agriculture. The United States moved to dismiss the complaint, urging that the "due care" and "discretionary function" exceptions to the Tort Claims Act (28 U.S.C. 2680(a), see Pet. App. 8a) precluded recovery.

After a trial on the merits, the district court granted the government's motion (Pet. App. 25a). It found (Pet. App. 16a-18a) that on February 13, 1975, Floyd Cotton, an agent from the Department of Agriculture's Office of Investigation, entered petitioner's plant in an undercover capacity following reports to the Department that the plant was processing adulterated meat from dead or dying

cattle for human consumption. While inside, Cotton saw a dead cow being taken into the plant for processing. Petitioner's employee Augustine Flores, an informant for the government, identified another dead cow that had been brought into the plant that same day. Based on these observations, government inspectors entered petitioner's plant and requested that plant operations cease pending a determination of what had happened to the dead cows. One carcass was seized and detained.

The district court ruled (Pet. App. 17a) that the investigation had been undertaken to determine whether adulterated beef was being processed for human consumption in violation of the Federal Meat Inspection Act (21 U.S.C. 601 *et seq.*). The court found that the Department of Agriculture had a reasonable basis for initiating this investigation (Pet. App. 18a) and had authority to do so (*id.* at 19a). The court also found that the federal agents had acted neither wrongfully nor negligently, and it entered judgment for the government (Pet. App. 21a). Moreover, the court found that it lacked jurisdiction because the government's agents acted with due care and in pursuit of a discretionary function (see 28 U.S.C. 2680(a)). It therefore dismissed the complaint (Pet. App. 25a).

The court of appeals affirmed (Pet. App. 28a-29a). Its affirmance was based on the district court's finding of due care. It did not reach the discretionary function issue.

2. The decision of the court of appeals is correct, and petitioner presents no issue warranting review. Petitioner's only apparent contention (see Pet. 2, 3) is that the United States should be liable if its agent "deliberately and unlawfully introduced a dead cow" into petitioner's plant

(Pet. 2). Petitioner points to nothing in the record to support this implication of misconduct, and the findings of the lower courts refute it.[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

APRIL 1979

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[1]Petitioner relies on *Clemente* v. *United States*, 422 F. Supp. 564 (D. P.R. 1976). That decision, however, was reversed by the court of appeals. 567 F. 2d 1140 (1st Cir. 1977), cert. denied, 435 U.S. 1006 (1978). In *Myers & Myers, Inc.* v. *USPS*, 527 F. 2d 1252 (2d Cir. 1975), the court held that the due care exception did not apply because the Postal Service had violated its own procedural regulations. *Portello & Co.* v. *Butz*, 345 F. Supp 1204 (D. D.C. 1972), held that federal regulations concerning meat processing did involve the exercise of discretion on the part of federal employees. *Smith* v. *United States*, 546 F. 2d 872 (10th Cir. 1976), is inapposite; there the United States, as a landowner, failed to post warning signs regarding hidden dangerous conditions. In *Downs* v. *United States*, 522 F. 2d 990 (6th Cir. 1975), FBI agents negligently carried out a previously promulgated hijacking policy, which resulted in several deaths. None of these cases supports petitioner.